Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1996

PAUL EASTERDAY,

Petitioner,

vs.

LARRY GILBERT in his individual capacity, and as Sheriff of Okaloosa County, Florida,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court erred by failing to find that the termination of deputy Paul Easterday was, in fact, made in retaliation for the exercise of his constitutional right of free speech.

II. Whether the Court of Appeals and the District Court failed to undertake a meaningful *Pickering* balancing analysis by speculating as to the actual and potential disruptiveness of speech of public concern without weighing the value of the employee's First Amendment rights.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Paul Easterday, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals, which affirmed per curiam the opinion of the District Court was not published, and is reproduced in the Appendix filed herewith (App.) at la-2a. The unreported opinion of the district court in this case is produced at 3a-12a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on November 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provision of the United States Constitution, First Amendment is set forth below:

> Congress shall make no law . . . abridging the freedom of speech .

The pertinent provision of 42 U.S.C. § 1983 is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States

> or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

This case arose out of Petitioner Paul Easterday's termination in December, 1991, as a deputy sheriff of Okaloosa County, Florida.

On December 23, 1991, at approximately 7:20 a.m., Easterday was present in the deputies' room of the Crestview district office of the Okaloosa County Sheriff's Office. Easterday was on duty and in uniform at the time, concluding his shift which commenced at 12:00 a.m. Shift change was in progress at this time. During shift change, members of the off-going shift, such as Easterday, met informally with deputies of the oncoming shift to prepare reports, exchange information, and socialize. Present at this time were Easterday's supervisor, Sgt. Dale Griffith, and deputies Tyson, Garrett, and Berry. (R2-33-15-17).

Sheriff Larry Gilbert was campaigning for re-election in a contested political race. Easterday remarked to those present that "Gilbert had never been a cop and, therefore, shouldn't be a sheriff." (R2-39-6). The Sheriff terminated Easterday eight days later for violating a departmental policy which provides: "Members shall not publicly criticize or ridicule the department, its policies, or any of its members." (R2-39-1-2). Easterday made the comment only one time, solely in the presence of the four other deputies with whom he worked, and gave the Sheriff a written apology later that day.

The evidence that Easterday's sole comment was disruptive of the Sheriff's Office was the testimony of the Sheriff, Sgt. Griffith, and deputies Berry and Garrett.

Deputy Garrett testified that Easterday, speaking in a normal tone of voice, said: ". . . anyone that didn't have past law enforcement experience shouldn't be elected sheriff." (R2-32-33). He further testified that the comment did not upset him and that he told Easterday to shut up since he could see that Sgt. Griffith was getting upset. (*Id.*). He further testified that Easterday's comment did not affect his respect for the sheriff, or his and other deputies job abilities. (*Id.*).

Sgt. Griffith, a member of the department since 1977, testified that he overheard Easterday's remark to deputy Tyson that ". . . the sheriff did not need to be sheriff." (R2-31-39).

Sheriff Gilbert's reasons for the termination were:

> 4. I dismissed Deputy Easterday because he made comments which were directly critical of my ability and qualification to lead this agency. Deputy Easterday challenged my leadership abilities and qualifications to lead the Okaloosa County Sheriff's Office by stating, while on duty, and in the presence of four other officers that I should not be sheriff because I had not been a law enforcement officer. When asked by his supervisor what he meant by these remarks, he referred to the fact that I had made a number of mistakes.
>
> 5. It was important that I take decisive action against Deputy Easterday to avoid

other officers from criticizing me or criticizing their supervisors while on duty. His comments had the potential, if not addressed, to have a negative impact upon discipline and the morale of this agency. I was concerned that if I allowed Deputy Easterday or any other deputy to make these disrespectful comments on duty, it would seriously affect my ability to lead the agency. While on duty, I expect the support and respect of my deputies who represent me before the people of Okaloosa County. When given an order, officers must respond positively and quickly. Allowing Easterday or any other deputy to question my management or leadership ability could detrimentally affect the deputies' willingness to responding to an order. The effectiveness of this agency's operations and its ability to serve the citizens of Okaloosa County could therefore be adversely affected.

6. I was aware at the time I dismissed Deputy Easterday that Easterday's sergeant, Dale Griffith, was very upset regarding the remarks that Easterday made in the presence of the other deputies, and that Griffith verbally reprimanded him for these remarks. Whether Easterday actually affected the performance of the deputies who overheard his comments was not as important as the potential for disruption which would occur if I did not discipline Deputy Easterday for his disrespectful and insubordinate remarks.

(R2-32, 43-45).

Deputy Tyson, to whom the remark was directed, testified as follows:

> 5. A political campaign for the office of Sheriff was underway. The conversation turned to being Sheriff, and Paul Easterday remarked that anyone that hasn't had law enforcement experience shouldn't be elected Sheriff, obviously referring to Sheriff Larry Gilbert. The tone of the remark was matter-of-fact and not inflammatory.
>
> 6. Sgt. Griffith told Paul Easterday to shut up and that ended the matter. Aside from Sgt. Griffith, no other officer commented on the subject matter and the group disbanded. Subsequently, I heard nothing of the matter except that Paul Easterday was terminated for having made the remark.
>
> 7. The incident had no effect on my job performance, nor did other officers speak to me of the incident. I had been a member of the Sheriff's Office for over twelve years and ofttimes heard political comment.

(R2-39-6-8).

Easterday filed suit under 42 U.S.C. § 1983, contending that his employment was wrongfully terminated because he exercised his constitutionally protected right of free speech. The District Court found that Easterday's speech constituted a "matter of public concern" because "[s]peech directed to public issues or candidates running for public office 'invariably address[es] matters of public concern because it is 'the unfettered

interchange of ideas for the bringing about of political and social changes desired by the people,"' *citing Stough v. Gallagher*, 967 F.2d 1523, 1527 (5th Cir. 1992). However, when applying the *Pickering* balancing test, the District Court found that "Easterday's comments posed several potential impediments to the functioning of the Sheriff's office;" that "Easterday's comments upset Sergeant Griffith and Deputy Berry regardless of their effect on Deputy Tyson;" that "Gilbert need only demonstrate the potential for disruption based on all the facts and circumstances;" that the time and place of the speech weighed against Easterday — "prior to a shift meeting, while on duty and in uniform;" and that "Easterday's statements effectively challenged Gilbert's ability to lead the Sheriff's office." The district court concluded that "Sheriff Gilbert's interest in maintaining the efficient functioning of his office outweighs Easterday's interest in making the on-the-job remarks at issue." The District Court failed to determine whether Easterday was terminated because of his speech, and made no mention of the value of Easterday's speech when conducting the *Pickering* balancing analysis. (App. B, 8a).

Easterday appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed on the basis of the District Court's opinion. (App. A, 1a-2a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on two important questions concerning employer liability for infringing the First Amendment rights of deputy sheriffs. The first issue is represented by the decision of the Second Circuit in *Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996), wherein the court set forth the necessity of considering the employer's reason for the termination:

To plead a *prima facie* case that he was fired in violation of his First Amendment rights, a plaintiff must establish that: (1) his speech can be "fairly characterized as . . . speech on a matter of public concern;" and (2) the speech was "at least a substantial or motivating factor in the discharge." *Frank,* 1 F.3d at 1328 (internal quotations and citations omitted).

It is clear, though, that a government official may, in certain circumstances, fire an employee for speaking — even on a matter of public concern — where that speech has the potential to disrupt the work environment. *See Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987). In *Jeffries v. Harleston,* 52 F.3d 9 (2d Cir.), *Cert. denied,* __*U.S.* __, 116 S.Ct. 173, 133 L.Ed.2d 114 (1995), we stated that termination does not violate the employee's First Amendment rights where:

> (1) the employer's prediction of disruptions is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

Id. at 13; *see also Waters v. Churchill,* 511 U.S. 661, __, 114 S.Ct. 1878, 1889-91, 128 L.Ed.2d 686 (1994); *see generally Board of County Comm'rs v. Umbehr,* __ U.S. __, __,

> 116 S.Ct. 2342, 2347-48, 2352, 135 L.Ed. 2d 843 (1996). Thus, even if the potential disruption to the office outweighs the value of the speech, the employer may fire the employee only *because of* the potential disruption, and *not because of* the speech. That is to say, it matters not that the potential disruption outweighs the value of the speech if the employer subjectively makes the speech the basis of his termination decision: such "retaliatory" discharge is always unconstitutional. (Emphasis in original.)

In the present case, Easterday was terminated for violating a sheriff's department policy which provided: "Members shall not publicly criticize or ridicule the department, its policies, or any of its members." Thus, Easterday was specifically terminated because of his speech, regardless of the District Court's subsequent *Pickering* analysis. The decision is directly at odds with the conclusions reached by the Second Circuit in *Sheppard, supra,* and with this Court's decisions in *Pickering* and *Connick v. Myers,* 461 U.S.138, 103 S. Ct.1684, 75 L. Ed. 2d 708 (1983). *See also Waters,* __ U.S. at __, 128 L. Ed. 2d at 701, and 708 (Scalia, J. dissenting). "[I]t is essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering,* 391 U.S. at 572. It is necessary to resolve this important question of First Amendment law, and to thereby resolve a conflict between the federal courts of appeal.

Second, the District Court's understanding of an appropriate *Pickering* balancing test appears to have given no or inadequate weight to Easterday's First Amendment rights, contrary to the searching analysis formerly employed in the Eleventh Circuit, *see Stough v. Gallagher,* 967 F.2d 1523, 1528-30 (11th Cir.1992), and decisions of other courts of appeal. Further, the evidence of

disruption and potential for disruption was weak and speculative. This ultimate factual finding by the District Court, affirmed per curiam by the federal Court of Appeals, is obviously in error and inconsistent with the analysis of similar facts by other courts of appeal. The dispute is not so much over the elemental facts as over the constitutional significance to be attached to the facts. The defect in the judgment is that the standard of proof of the potential for disruption of the sheriff's department was considerably less exacting than that required by *Connick, Pickering* and *Waters* to override Easterday's First Amendment rights.

Third, the Eleventh Circuit sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. If the bland, political speech of deputy Easterday is subject to sanctions in the Eleventh Circuit, "policemen . . . are . . . relegated to a watered down version of constitutional rights." *Garrity v. New Jersey,* 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

I.

WHETHER THE COURT ERRED BY FAILING TO FIND THAT THE TERMINATION OF DEPUTY PAUL EASTERDAY WAS, IN FACT, MADE IN RETALIATION OF THE EXERCISE OF HIS CONSTITUTIONAL RIGHT OF FREE SPEECH.

The District Court did not address the core factual issue of the case; that is, whether deputy Easterday was fired in retaliation for protected political speech. "The critical inquiry for the fact finder in these cases is whether the employment decision was, 'in fact, made in retaliation for [the] exercise of the constitutional right of free speech.' " *Waters*, 511 U.S. 661, 128 L. Ed. 2d at

708, *quoting Perry v. Sindermann,* 408 U.S. 593, 598, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Deputy Easterday was terminated for violating a written department policy prohibiting such speech. Accordingly, a *Pickering* balancing requirement did not come into play because Easterday was not terminated because of the actual or potentially disruptive consequences of his speech, but, rather, because of the speech. *See also Connick v. Myers, supra*; *Rankin v. McPherson,* 483 U.S. 378, 383, 107 S. Ct. 2891, 2896, 97 L. Ed. 2d 315 (1987); *Waters,* 511 U.S. 661, 128 L. Ed. at 712 (The First Amendment, however, demands that the Government respect its employees' feedom to express their opinions on issues of public importance. As long as that expression is not unduly disruptive, it simply may not provide the basis for discipline or termination. The critical issues in a case of this kind are (1) whether the speech is protected, and (2) whether it was the basis for the sanction imposed on the employee.) (Stevens, J. dissenting).

II.

WHETHER THE COURT OF APPEALS AND THE DISTRICT COURT FAILED TO UNDERTAKE A MEANINGFUL *PICKERING* BALANCING ANALYSIS BY SPECULATING AS TO THE ACTUAL AND POTENTIAL DISRUPTIVENESS OF SPEECH OF PUBLIC CONCERN WITHOUT WEIGHING THE VALUE OF THE EMPLOYEE'S FIRST AMENDMENT RIGHTS

While this Court has instructed that lower courts are to "look to the facts as the employer reasonably found them to be," and that the government is entitled to consider the "potential disruptiveness of the speech," *Waters v. Churchill,* 511 U.S. 661, 114 S. Ct. at 1889-90, the issue of whether a public employer has a sufficiently good reason to justify infringing upon that right by dismissing the employee will generally depend in

significant part on the nature of the criticism that was voiced, *see Pickering v. Board of Educ.*, 391 U.S. 563, 569-73, 88 S. Ct. 1731, 1735-37, 20 L. Ed. 811 (1968), and a reasonable assessment of the disruptive potential of that speech. *Waters*, 511 U.S. at __, 114 S. Ct. at 1884-86, 1889. Unlike the district court and the summary affirmance by the Eleventh Circuit in the present case, other circuit courts have required a more substantial showing of damage of the government's interest. In *Sanchez v. City of Santa Ann*, 936 F.2d 1027, 1038 (9th Cir.1990), the court found retaliation for protected speech entitled to jury consideration. The plaintiffs had formed the LPOA, met with city personnel, submitted LPOA packet, filed EEOC complaints and instigated legal activities. Certainly such speech was far move disruptive and potentially disruptive than the matter-of-fact speech of Easterday.

The type of substantial showing that is required is demonstrated by the court's analysis in *Wulf v. City of Wichita*, 883 F.2d 842, 860-62 (10th Cir. 1989):

> We turn now to balancing Wulf's interest in writing the letter against the interest of defendants in "promoting the efficiency of the public services it performs through its employees." *Rankin*, 107 S.Ct. at 2896 (quoting *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734). In performing the requisite balancing under *Pickering*, we must bear in mind the heightened interest of a police department in maintaining discipline and harmony among employees. *See Koch*, 847 F.2d at 1452 n. 22 (and cases cited therein); *Waters v. Chaffin*, 684 F.2d 833, 836, 839 (11th Cir.1982).

Pickering directs us to consider a number of factors in balancing the competing interests at stake. "[T]he manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin,* 107 S.Ct. at 2898 (citing *Connick,* 461 U.S. at 152-53, 103 S.Ct. at 1692-93). Pertinent considerations include whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin,* 107 S.Ct. at 2899.

Taken together, the above factors reveal that the state's interest "focuses on the effective functioning of the public employer's enterprise." *Id.* Considering those factors, we find that Wulf's interest in writing the letter outweighed defendants' interest in discharging him. While there was some testimony that Wulf's letter caused controversy among officers and was the topic of conversation, those conversations were also described as "just idle gossip and talk," and there was no evidence that the letter adversely affected discipline. More importantly, there was evidence that at least some of the allegations in Wulf's letter, concerning different treatment of the FOP private club than other private clubs and efforts by superior officers to discourage

lieutenants and other supervisory officers from belonging to the FOP, were already the topic of discussion and concern *before* Wulf wrote his letter. To the extent there was controversy and disruption occasioned by the allegations relating to the FOP, those were not entirely *caused by* Wulf's letter; rather, they were a partial inspiration for Wulf's letter. *See Solomon v. Royal Oak Township,* 842 F.2d at 866.

Similarly, the letter did not adversely affect "close working relationships for which personal loyalty and confidence are necessary." *Rankin,* 107 S.Ct. at 2899. There was testimony that LaMunyon, the person most directly criticized by the letter, was angry and upset when he learned of the letter, but LaMunyon was not someone with whom Wulf worked closely or regularly. Indeed, Wulf and LaMunyon were separated by the chain of command, and Wulf had to seek permission to speak to LaMunyon about Wulf's concerns about the department. Additionally, Wulf did not address the letter to LaMunyon or to any other person with whom he would have regular contact, and when he did finally deliver the letter to the Attorney General, he insisted on confidentiality. Although Wulf showed drafts of the letter to a few other officers, as well as to Assistant District Attorney Jim Puntch, there is no evidence that his showing the drafts, or the final delivery of the letter, had any impact on his relationship with those

other officers or with Puntch or on any other relationships, except that with LaMunyon.

There is also no evidence that the letter either demonstrated Wulf's lack of fitness to perform his duties or "impede[d] the performance of [his] duties." *Id.* Indeed, Wulf's personnel record reveals that he was consistently evaluated as a competent and satisfactory employee. While his evaluation for the year March 1979 through March 1980 (*before he* wrote the letter) expressed a concern about Wulf distinguishing between the "dual job relations of . . . supervisor and FOP office holder," he nonetheless was evaluated as "competent" in every area and overall.

Finally, there was insufficient evidence that Wulf's writing of the letter interfered with the police department's "regular operation." *Rankin,* 107 S.Ct. at 2898. LaMunyon's otherwise essentially unsubstantiated testimony that Wulf's "loyalty and his trust in terms of the burden placed on him was certainly questionable . . . I think it [the letter] had a serious impact in terms of our operation," does not persuade us to the contrary. There has been some confusion about how much disruption must be shown before an employer may discipline or sanction an employee because of that employee's protected speech. *See Melton,* 879 F.2d at 716. Some circuits suggest that a reasonable belief that disruption will occur

is sufficient in certain circumstances. *See id.* at 716 n. 11. However, "purely speculative allegations" are insufficient. *Id. (27)* Although LaMunyon testified that he felt the letter disrupted the operations of the department, insufficient evidence supporting or demonstrating such disruption was presented. *See Key v. Rutherford,* 645 F.2d 880, 885 (10th Cir.1981) ("operational efficiency objections to speech must be real and important before they can serve as a basis for discipline or discharge of a public employee.").

In sum, there is simply insufficient evidence that the *letter itself* interfered with effective functioning of the police department. Rather, the evidence supports the conclusion that Wulf's letter was seeking to rectify malfunctions already present in the department. Additionally, there is no evidence that LaMunyon would ever have realized the impropriety in his use of departmental funds to mail Christian Police Officers' Association bulletins without Wulf's letter. *See Brawner v. City of Richardson, Texas,* 855 F.2d at 192; *Marohnic v. Walker,* 800 F.2d 613, 616 (6th Cir.1986).

Neither Wulf's position as a police officer, nor the heightened interest of a police department in maintaining discipline persuade us that the balance should tip in favor of the department. We therefore hold that Wulf's interest in writing the letter

> outweighed the department's interest in terminating him because of it.

Similarly, in *Garetto v. Mason,* 100 F.3d 803, 812 (10th Cir. 1996), the court, noting in part that "advocacy of a particular candidate for public office is the type of core political speech the First Amendment was designed to protect," conducted a searching analysis to determine whether the government showed substantial potential for disruption, stating:

> Once a court determines that the plaintiff's speech involves a matter of public concern, the *Pickering* balancing test requires a court to weigh "the interest of a public employee in commenting on such matters [against] the interest of the employer in promoting the efficiency of its services." *Ware v. Unified Sch. Dist. No. 492,* 881 F.2d 906, 910 (10th Cir.1989), *modified in part,* 902 F.2d 815 (1990). In performing this balancing, the court should not consider the statement in a vacuum; the manner, time, and place of the employee's expression are relevant, as well as the context in which the statement arose. *Connick,* 461 U.S. at 152-53, 103 S.Ct. at 1692-93.
>
> Under the *Pickering* balancing test, the employee's First Amendment free speech rights are protected "unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Wren,* 793 F.2d at 1318 (quoting *Childers v. Independent Sch.Dist. No. 1,* 676

> F.2d 1338, 1341 (10th Cir.1982)). Relevant considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin,* 483 U.S. at 388, 107 S.Ct. at 2899. The government, however, cannot rely on purely speculative allegations that certain statements caused or will cause disruption to justify the regulation of employee speech. *Wulf v. City of Wichita,* 883 F.2d 842, 862 (lOth Cir.1989). Furthermore, the government's concerns about the impact of speech must be reasonable and formed in good faith. *Waters v. Churchill,* 511 U.S. 661, __, 114 S.Ct. 1878, 1889, 128 L.Ed.2d 686 (1994).
>
> A careful review of the record indicates that the defendants failed to introduce any evidence of actual disruption to EWC's services arising from the remaining four speech incidents at issue in this case.

The Fourth Circuit also employs a searching analysis to determine whether a police officer's free speech rights are outweighed by the employer's interest in promoting the efficiency of the public services. In *Cromer v. Brown*, 80 F.3d 1315, 1327-29 (4th Cir. 1996), a police lieutenant's right to speak freely about alleged broad-based racial discrimination in the department was found not to carry such potential for disruption,

discipline, morale and good working relationships in the department as to preclude his speech from being protected.

The Seventh Circuit also gives substantial consideration to terminations of public employees for political support of competing interests, and undertakes an in depth analysis of the importance of the speech at issue. *See Zorzi v. County of Putnam*, 30 F.3d 885, 896-97 (7th Cir. 1994).

The defendant has failed to identify a reasonable basis for his actions in terminating Easterday for seemingly innocuous political commentary. In *Patkus v. Sangamon – Cass Consortium*, 769 F.2d 1251, 1258 (7th Cir. 1985), it was noted that a court should look to the "ordinary or foreseeable effect of the conduct . . . to determine whether it would be reasonably calculated to create division or to have impaired discipline."

Also, this is not a case where the government's justifications for regulating speech are stronger because an officer's critical statements related to someone with whom the officer had to work closely. In *Joyner v. Lancaster*, 815 F.2d 20, 24 (4th Cir.), *cert. denied*, 484 U.S. 830, 108 S. Ct 102, 98 L. Ed. 2d 62 (1987), the court rejected the First Amendment claims of a discharged captain in the sheriff's department in part because he was "a highly placed official in a para-military unit," and because "[he] had an important role in the implementation of the sheriff's policies, and he was an essential link between the sheriff and the deputies whom he supervised." Similarly, in *Campbell v. Towse*, 99 F.3d 820 (7th Cir.1996), the court found a police watch commander's letter of opposition to a community-oriented policing program inconsistent with the chief of police's need for loyalty of his subordinates who work in the highest echelons and are entrusted with carrying out his orders, at times under trying conditions.

Further, the only apparent disruption of the sheriff's department was the sharp reaction of Sergeant Griffith to what he considered disloyal speech by Easterday. Yet, Easterday's bland statement of political opinion was clearly neither disruptive to the department as a whole nor likely to be. Further, the form and content of Easterday's speech was relevant in determining whether the sheriff "may constitutionally be required to tolerate some degree of disruption resulting from the utterance." *Connick,* 461 U.S. at 164 n. 4, 103 S. Ct at 1699 n. 4 (Brennan, J. dissenting). While the court determined that Easterday's speech addressed a matter of public concern, if failed to weigh the importance of that speech against the employer's interest. Rather, the court disregarded any consideration or statement of the importance of Easterday's speech and speculated as to the speech's potential for disruption. The *Pickering* analysis requires particularized balancing based on the unique facts presented in each case. *Connick,* 461 U.S. at 150, 103 S. Ct. at 1691-92. The district court opinion is bereft of any balancing analysis, and the summary affirmance thereof, demonstrates that police officers have watered-down First Amendment rights in the Eleventh Circuit.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED NOVEMBER 5, 1996

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2648
Non-Argument Calendar

D.C. Docket No. 93-30628-LAC

PAUL EASTERDAY,

Plaintiff-Appellant,

versus

LARRY GILBERT; SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(November 5, 1996)

Before BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Upon a de novo review of the record in this case, we affirm

the summary judgment entered in favor of Defendant-Appellee for the reasons set forth in the district court's order of April 18, 1996.

AFFIRMED.

APPENDIX B — JUDGMENT AND ORDER OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA DATED APRIL 18, 1996

United States District Court

Northern District of Florida

Docket Number

CIVIL ACTION NO. 93-30628/LAC

Name of Judge or Magistrate Judge

LACEY A. COLLIER

Case Title:

PAUL EASTERDAY

V.

LARRY GILBERT, individually and in his official capacity as Sheriff of Okaloosa County, Florida

JUDGMENT IN A CIVIL CASE

* * *

X **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.

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IT IS ORDERED AND ADJUDGED

Judgment is entered against plaintiff, PAUL EASTERDAY, in favor of Defendant, LARRY GILBERT, individually and in his official capacity as Sheriff of Okaloosa County, Florida.

ROBERT A. MOSSING, CLERK

By Deputy Clerk: Jerry Marbut
s/ Jerry Marbut April 18, 1996

ENTERED ON DOCKET April 18, 1996 BY irw

Copies mailed to: *Evans, Tipler, COB: 1996*

Appendix B

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

CIVIL ACTION NO. 93-30628/LAC

PAUL EASTERDAY,

Plaintiff,

v.

LARRY GILBERT, individually and in his official capacity as Sheriff of Okaloosa County, Florida,

Defendant.

ORDER

This is a civil rights action pursuant to 42 U.S.C. § 1983. Defendant moves for summary judgment arguing no genuine issues of material fact exist and he is entitled to judgment as a matter of law. (doc. 31). For the reasons below, the motion is granted.

I. *Background*

Plaintiff Paul Easterday is a former Deputy Sheriff for Okaloosa County, Florida. On December 23, 1991, he made several critical remarks about Okaloosa County's elected Sheriff, Larry Gilbert, during a morning shift change. While in uniform and in the presence of four other deputies, Easterday commented that Gilbert, who was up for re-election at the time, "had never been a cop and, therefore, shouldn't be a sheriff."

Sergeant Dale Griffith overheard the comment and asked Easterday what he meant by it. Easterday responded, "Just look at all the mistakes he has made." Griffith asked Easterday to identify the mistakes, and Easterday answered, "Just all his mistakes." Griffith then became angry and responded that the only mistake Sheriff Gilbert had made was hiring Easterday.

Eight days later, Sheriff Gilbert discharged Easterday, explaining he could not have people criticizing him behind his back in front of other deputies. In 1993 Easterday filed this action alleging he was discharged for exercising his First Amendment right to freedom of speech. This motion for summary judgment followed.

II. *Discussion*

Pursuant to Federal Rule of Civil Procedure 56, Sheriff Gilbert urges the Court to enter summary judgment in his favor. In support, he argues Easterday cannot maintain a section 1983 action because his on-the-job remarks were not protected by the First Amendment. At the outset, the Court notes motions for summary judgment can be granted only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Everett v. Napper,* 833 F.2d 1507, 1510 (11th Cir. 1987). An issue of fact is "genuine" if the record as a whole could lead a rational trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "material" if it might affect the outcome of the case under the governing law.

Id. In ruling on a motion for summary judgment, the Court must take the evidence in a light most favorable to the nonmoving party. *Griesel v. Hamlin,* 963 F.2d 338, 341 (11th Cir. 1992). With this standard in mind, the Court agrees judgment should be entered for Sheriff Gilbert.

A public employee's right to freedom of speech is not absolute. *See Bryson v. City of Waycross,* 888 F.2d 1562, 1565 (11th Cir. 1989). Rather, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Under certain circumstances, therefore, a government employer may lawfully discharge an employee for making public remarks or comments.

To determine whether a given discharge is lawful, the Court must make two inquiries. First, the Court must determine whether the speech at issue constitutes a "matter of public concern." *Bryson,* 888 F.2d at 1565 (quoting *Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)). Assuming it does the Court must then conduct a balancing test, weighing the employee's interest as a citizen in commenting upon matters of public concern against the state's interest as an employer in promoting efficiency in the delivery of public services. *Id.* (quoting *Pickering,* 391 U.S. at 568). If the state's interest outweighs that of the employee, no First Amendment violation has occurred. Both inquiries are matters of law to be decided by the Court. *Id.* at 1566 n.2.

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A. *"Matter of Public Concern"*

Initially, the Court finds Easterday's comments constitute a "matter of public concern." The statements suggested Gilbert was unfit or unqualified to hold the office of Sheriff. Speech directed to public issues or candidates running for public office "invariably address[es] matters of public concern because it is the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Stough v. Gallagher,* 967 F.2d 1523, 1527 (11th Cir. 1992) (internal citations omitted).

B. *Pickering Balancing Test*

Accordingly, the Court must balance Easterday's interest in making these remarks against Sheriff Gilbert's interest in maintaining the efficient operation of his office. *See Pickering,* 391 U.S. at 568. Three criteria are relevant to this inquiry: (1) whether the speech at issue impeded the government's ability to perform its duties efficiently, (2) the time, place and manner of the speech, and (3) the context in which the speech was made. *Bryson,* 888 F.2d at 1567. For the reasons below, the Court finds this balance favors Sheriff Gilbert.

1. *Impediment to Government Functions*

An employee's speech impedes government functions if it "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 1562 (quoting *Rankin,* 483 U.S. at 388).

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In this case, Easterday's comments instantly caused friction with his co-workers. Upon hearing the remarks, Seargeant Griffith became angry, challenged Easterday to explain himself, and then personally insulted him.[1] During the exchange, Deputy Ralph Garrett noticed Sergeant Griffith was becoming so angry that he twice warned Easterday to "shut up." Similarly, the comments upset Deputy Hank Berry, who submitted an affidavit stating, "deputies are an extension of the [S]heriff, and it troubled me that Easterday was openly critical of the Sheriff while on duty and in the presence of other officers such as myself."

Moreover, Easterday's comments posed several potential impediments to the functioning of the Sheriff's office. According to Sheriff Gilbert's affidavit, morale and discipline are essential to the proper functioning of his office. When the Sheriff gives an order, deputies must respond positively and quickly. By criticizing his ability in front of other on-duty officers, Easterday challenged Gilbert's leadership ability. Had the Sheriff not acted decisively in disciplining Easterday, dissention might have grown, thereby affected other officers' willingness to respond to the Sheriff's orders.

Deputy Ralph Garrett agreed: "Negative statements towards the Sheriff or other law enforcement officers may cause a problem to agency morale. . . . Failure to discipline a deputy for making disrespectful remarks, such as those made by Deputy Easterday, could open the door to other deputies challenging the Sheriff's ability to lead the agency." Likewise, Sergeant Griffith stated:

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1. Griffith reportedly said the only mistake Sheriff Gilbert had made was hring Easterday's "red-headed ass."

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> Criticizing fellow workers and supervisors, including the Sheriff, in the presence of other officers is detrimental to maintaining the harmony and morale of the officers, which is so important to a law enforcement agency. . . . Deputy Easterday's comments, if not addressed, could have brought unrest, lack of discipline, and disrupted the harmony among the deputies, which would detract the agency from performing its mission of promoting the safety of persons and property throughout Okaloosa County.

The Eleventh Circuit recognizes the special concerns of maintaining discipline in police departments. "Order and morale are critical to successful police work: a police department is 'a paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers.' " *Hansen v. Soldenwagner,* 19 F.3d 573, 577 (11th Cir. 1994) (internal citations omitted); *see also Connic v. Meyers,* 461 U.S. 138, 151-52, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.)"

Easterday argues in response that summary judgment should not be granted because a genuine issue remains whether his comments, in fact, impeded or disrupted the functioning of the Sheriff's office. In support, he submits the affidavit of Greg Tyson, an officer present when the comments were made. Tyson maintains Easterday's remarks had no effect whatsoever on his own job performance.

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The Court finds Tyson's affidavit insufficient to defeat summary judgment for two reasons. First, the evidence shows Easterday's comments upset Sergeant Griffith and Deputy Berry regardless of their effect on Deputy Tyson. In this Court's view, a comment need not upset every officer on the force before it can be considered disruptive.

Secondly, at any rate, Sheriff Gilbert need not prove Easterday's comments *actually* caused any disruption in the office. As recognized by the Supreme Court, a government employer need not wait for events to deteriorate to the point of actual disruption or destruction of working relationships before taking action against an employee. *See Connick,* 461 U.S. at 152. Gilbert need only demonstrate the potential for disruption based on all the facts and circumstances. The facts here reach the necessary level.

2. *Time, Place and Manner*

The fact Easterday's statement impeded, and might have further impeded, the efficient functioning of the Sheriff's office is even more evident upon examining the second factor: the time, place, and manner in which the speech was delivered. Easterday made the critical statements to his fellow deputies just prior to a shift meeting, while on duty and in uniform. *See Bryson,* 888 F.2d at 1567 (speech unprotected when employee "chose to spend police department time broadcasting his rancor"). Such comments are far different then the off-duty, out-of-uniform remarks found protected in *Waters v. Chaffin,* 684 F.2d 833 (11th Cir. 1982).

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3. *Context*

The third factor — context — also weighs in Sheriff Gilbert's favor. Easterday's statements effectively challenged Gilbert's ability to lead the Sheriff's Office. For reasons already discussed, Gilbert had a powerful motive to deal with such remarks decisively.

In sum, the Court has applied the *Pickering* balancing test and finds Sheriff Gilbert's interest in maintaining the efficient functioning of his office outweighs Easterday's interest in making the on-the-job remarks at issue. Easterday's speech therefore was not protected by the First Amendment, and he cannot maintain a section 1983 action based on his discharge.

III. *Conclusion*

Accordingly, it is hereby **ORDERED**:

1. Defendant's motion for summary judgment (doc. 31) is **GRANTED**.

2. The Clerk shall enter judgment against Plaintiff in favor of Defendant.

ORDERED on this 18th day of April, 1996.

s/ Lacey A. Collier
Lacey A. Collier
U.S. District Court

APPENDIX C — COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 93-30628LAC

PAUL EASTERDAY, an individual,

Plaintiff,

vs.

LARRY GILBERT, an individual, and SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendants.

COMPLAINT

Plaintiff sues the Defendants and alleges:

1. Plaintiff, Paul Easterday, is a resident of Crestview, Florida, and a former deputy sheriff of Okaloosa County, Florida.

2. Defendant, Larry Gilbert ("Gilbert"), is a resident of Okaloosa County, Florida, and at all material times was Sheriff of Okaloosa County, Florida.

3. Sheriff, Okaloosa County, Florida ("Sheriff"), is a political subdivision of Okaloosa County, Florida.

4. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). Venue of this action is proper under 28 U.S.C. § 1391(b).

5. Plaintiff, at all material times, was employed by Sheriff as a deputy sheriff. On or about December 23, 1991, Plaintiff presented himself for work at the Okaloosa County Sheriff's Department. Prior to the shift meeting, Plaintiff commented to three or four other deputy sheriffs that "Gilbert had never been a cop and, therefore, shouldn't be a sheriff".

6. At that time, a contested political race was underway for the office of Sheriff of Okaloosa County.

7. On December 31, 1991, eight days later, Sheriff Gilbert retaliated and terminated Plaintiff as a deputy sheriff for having made such a remark. The reason given by the Sheriff was that the Plaintiff had violated a department policy which states, "Members shall not publicly criticize or ridicule the department, its policies, or any of its members".

8. A grievance committee of the Sheriff's Office reviewed the dismissal and unanimously approved the Sheriff's act of dismissing Plaintiff.

COUNT ONE

9. This is an action for declaratory judgment and a mandatory permanent injunction.

10. Paragraphs one (1) through eight (8) are incorporated herein.

11. Plaintiff contends that he was wrongfully discharged because he had exercised his constitutionally protected right of free speech; that is, that the Sheriff, acting under color of state law, deprived Plaintiff of his public employment in retaliation for expression protected under the first amendment.

12. Defendant contends that Plaintiff was terminated for violating established Sheriff Department policy prohibiting public criticism or ridicule of the Sheriff.

13. Plaintiff is in doubt about Plaintiff's rights under 42 U.S.C. § 1983 to protection from wrongful discharge for expression protected by the first amendment.

WHEREFORE, Plaintiff demands judgment as follows:

1. A judgment declaring Plaintiff's rights.

2. A preliminary and permanent injunction reinstating Plaintiff as a deputy sheriff, Okaloosa County, Florida.

3. Damages in an amount equal to the pay that Plaintiff has lost as a consequence of the wrongful discharge by the Sheriff.

4. A reasonable attorney's fee.

5. Such other and further relief as the Court deems just and proper.

COUNT TWO

14. This is an action by Plaintiff against Gilbert for damages pursuant to 42 U.S.C. § 1983 for deprivation of Plaintiff's first amendment free speech rights under color of state law.

15. Paragraphs 1 through 8 are incorporated herein.

16. Acting under color of authority of his office as Sheriff

of Okaloosa County, Florida, Gilbert deprived Plaintiff of his right under the First and Fourteenth Amendments of the United States Constitution to freely express his political opinion as to the qualifications of a sheriff, a matter of public concern during an ongoing political campaign for the office of sheriff.

17. Plaintiff made the comment only once, only in the presence of other deputy sheriffs assembled at the Sheriff's Office, and that same day wrote a letter of apology to the Sheriff. The speech was in no manner disruptive of the Sheriff's Office.

18. Plaintiff has suffered damages in lost wages and loss of employment as a deputy sheriff, a job to which Plaintiff had aspired from early school days. Plaintiff has suffered humiliation, loss of personal reputation, loss of dignity, and emotional distress as consequence of his termination of employment.

19. Defendant, Gilbert's, acts were spiteful, malicious, and outrageous, for which Plaintiff claims punitive damages.

WHEREFORE, Plaintiff demands judgment as follows:

1. Lost wages.

2. Punitive damages of $1,000,000.

3. For a reasonable attorney's fee.

4. Costs of this action.

5. For such other and further relief as the Court deems proper.

Appendix C

THE TIPLER LAW OFFICES

By: s/ James H. Tipler
Paradise Village
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(904) 664-0600
Florida Bar No. 0476307

Plaintiffs hereby demand a trial by jury.

s/ James H. Tipler
Counsel for Plaintiff